

MEMORANDUM

TO: District of Columbia Zoning Commission

FROM: Maxine Brown-Roberts, Development Review Specialist
JLS
Jennifer Steingasser, Deputy Director Development Review & Historic Preservation

DATE: March 23, 2023

SUBJECT: ZC 13-14D, McMillan Reservoir Slow Sand Filtration Site, Parcel 2 - 2nd PUD
Extension for Three-Years Time for ZC Orders 13-14, 13-14A(1) and 13-14C

I. RECOMMENDATION

McMillan Parcel 2 Owner LLC (“Applicant”) request:

1. Pursuant to Subtitle Z, § 705.2 - A second extension of time in which to file a building permit application for McMillan Reservoir Slow Sand Filtration Site (“McMillan Site”), Parcel 2; and
2. Pursuant to Subtitle Z, § 705.5A and Subtitle Z § 101.9 - A waiver from the requirements to allow a second extension for more than one year.

The Office of Planning (“OP”) recommends **approval** of the request for a second time extension and for a waiver to allow the Applicant three years in which to file for a building permit for Parcel 2.

II. LOCATION AND SITE DESCRIPTION

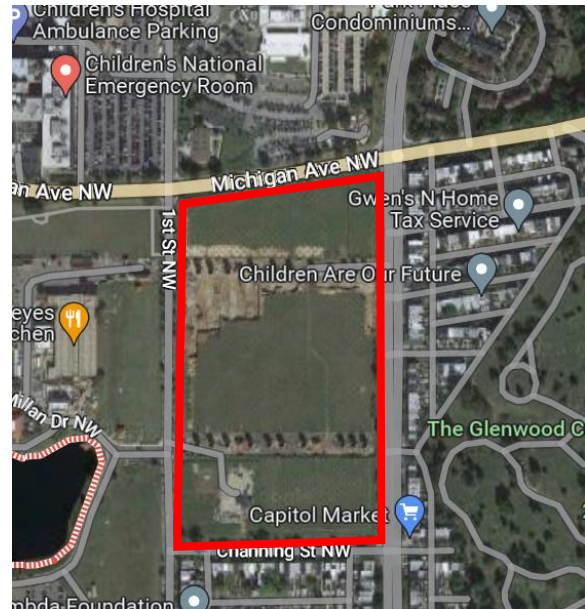
Address	McMillan Reservoir Slow Sand Filtration Site
Applicant	McMillan Parcel 2 Owner LLC
Legal Description	Square 3128, Lot 815
Ward/ANC	Ward 5/ANC 5A
Project Summary	Parcel 2 has a lot area of 66,654 square feet. It is proposed to be developed with a seven-story (82.5 feet high), mid-rise structure joined together below grade (parking) and above grade at floors 3 to 7. The building would have an area of 243,050 gross square feet (5.04 FAR, 3.64 FAR when streets and easements are excluded), including 224,278 gross square feet of residential use (236 units) and 18,772 gross square feet of ground floor retail uses.
Second Stage PUD Order Effective Date	April 22, 2016

2-Year Time Extension Effective date	March 2, 2021
2- Year Time Extension Expiration Date	March 2, 2023
Request	Three-year extension

III. PHOTOS OF THE SITE



Site at original approval on April 22, 2016



Site in 2023

IV. EVALUATION OF THE EXTENSION REQUEST

Subtitle Z, § 705.2

Subtitle Z, § 705.2 allows an extension of a PUD if “good cause” is shown upon the filing of a written request by the Applicant before the expiration of the approval, provided that the Zoning Commission determines that the following requirements are met:

- (a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond.**

The application submitted to the Zoning Commission is dated February 22, 2023 and has been in the public record since filing. As shown on the Certificate of Service provided by the Applicant at Exhibit 3, ANC-5E and ANC-1E (which is adjacent to the west side of the property) have been served.

- (b) There is no substantial change in any of the material facts upon which the Zoning Commission based its original approval of the planned unit development that would undermine the Commission’s justification for approving the original PUD.**

There has been no substantial change in the material facts or justification upon which the Zoning Commission based its original approval of the First and Second Stage PUDs for Parcel 2.

Zoning Regulations

The consolidated PUD was approved under the 1958 Zoning Regulations. Procedurally, the extension request is being reviewed under the 2016 Zoning Regulations. The criteria under which an extension request is reviewed are the same under both sets of regulations, however, the permitted number of time extensions requests has changed. Under Subtitle Z, § 705.5, no more than two extensions may be requested for a PUD and the second extension may be approved for no more than one year. The Applicant has requested a waiver to allow a second time extension for three-years and OP believes that the Applicant has demonstrated good cause to grant the waiver as discussed further in this report.

Comprehensive Plan

The Comprehensive Plan Future Land Use Map (FLUM) designation of the McMillan site was modified in the recent 2021 amendment to change the northern portion of the McMillan PUD site, including Parcel 2, from Mixed Use (Moderate Density Commercial/Medium Density Residential/Parks and Open Space) to Mixed Use (Medium Density Commercial/Medium Density Residential/Parks and Open Space). The First and Second Stage PUD for Parcel 2 is even more consistent with this new designation.

The McMillan site is within the Mid-City Area Element which makes specific policy recommendations for the McMillan site at **MC-2.6 McMillan Sand Filtration 201**. Further, **Policy MC-2.6.5: Scale and Mix of New Uses** now recommends:

Recognize the substantial potential of the McMillan Sand Filtration site to address multiple planning and development priorities and that development of the site is necessary to stabilize the site and provide the desired open space and amenities. Development of the site should consist of residential, retail, office, and recreational uses. Residential development should include a mix of units and housing types for persons of various incomes; new buildings should be planned and designed in a manner that is informed by the height, mass, scale, and uses of existing and planned buildings in the surrounding area, as appropriate. Other uses may include health care facilities that provide connectivity to the Washington Hospital Center. Compatible with the rules governing PUDs, the density for the McMillan Sand Filtration Site shall be calculated for the site as a whole. Individual buildings may have greater height than is typically associated within a specific land use designation. New buildings should be planned and designed in a manner that is informed by the height, mass, scale, and uses of the surrounding context, as appropriate. 2016.

The approved PUD for Parcel 2 would continue to be not inconsistent with Area Element recommendations for residential, retail and publicly accessible amenities that respond to community needs. The amended policies also support a mix of residential units and housing types for persons of various incomes. The approved height and density on Parcel 2 would remain fully consistent with the amended FLUM and with all of the changes made to the policies of the Mid-City Area Element.

The McMillian site continues to be identified in the 2021 Generalized Policy Map as a land use change area but is now within a larger area designated for a Future Planning Analysis Area. The approved PUD itself serves the function of planning analysis. None of these amendments to the Comprehensive Plan undermine the Commission's justification for approving the Parcel 2 PUD and in fact reinforces the original determination that the PUD is not inconsistent with the Comprehensive Plan maps and policies.

Surrounding Development

No new development has been approved or constructed in the vicinity of the site since the Second Stage approval.

(c) The applicant demonstrates with substantial evidence that there is good cause for such extension, as provided in Subtitle Y, § 705.2 (c)

One or more of the following criteria must be met:

(1) An inability to obtain sufficient project financing for the planned unit development, following an applicant's diligent good faith efforts to obtain such financing, because of changes in economic and market conditions beyond the applicant's reasonable control;

N/A

(2) An inability to secure all required governmental agency approvals for a planned unit development by the expiration date of the planned unit development order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control;

The Applicant states that in order to get a building permit, it was necessary for the overall McMillian site to be subdivided to create new record and assessment and taxation ("A&T") lots which would then be sold to each developer for construction. As owner of the property, the District was responsible for the timing and processing of the subdivision plat. However, the District was delayed in the processing of the subdivision plat due to having to respond to appeals relating to the PUD as well as appeals of the Demolition Permit. Following the dismissal of the appeals, the District processed the subdivision and recordation of the lots following which the Applicant was able to get ownership of Parcel 2 on September 29, 2022.

(3) The existence of pending litigation or such other condition, circumstance or factor beyond the applicant's reasonable control which renders the applicant unable to comply with the time limits of the planned unit development order.

As outlined on the table below, there have been a number of appeals to the District of Columbia Court of Appeals of ZC Order No. 13-14 for a consolidated PUD (Parcels 1 and 4-7) and First-stage PUD for Parcels 2 and 3, as well as ZC Order 13-14A, Second Stage PUD for Parcels 2, the subject of this extension.

Orders	Effective Date	Appeal	Court of Appeal Action and Date
Z.C. Order 13-14 for the Overall PUD, First Stage	April 17, 2015	May 6, 2015	December 8, 2016 the Court of Appeals

approval for Parcels 2 and 3 and Consolidated approval for Parcel 1 and Parcels 4 – 7.			vacated and remanded the order back to the Zoning Commission for further processing.
Z.C. Order No. 13-14A. ZC approved Second Stage PUD Order for Parcel 2	April 22, 2016 for 2-years. Expire – April 22, 2018	May 23, 2016	April 17, 2017 Order remanded to the Zoning Commission for further processing.
Z.C. Order No. 13-14(6)). The ZC again granted Consolidated approval for Parcel 1 and Parcels 4 – 7 and 2 nd Stage approval for Parcels 2 and 3.	June 18, 2018	June 27, 2018	January 22, 2019. Court heard oral arguments on the appeal.
Z.C. Order No. 13-14A(1). ZC approved 2 nd Second Stage PUD Order for Parcel 2.	September 28, 2018	October 24, 2018	September 27, 2019 affirming the Second McMillan Order.
Z.C. Order No. 13-14A(1).	October 2, 2020	--	March 2, 2021 the Court affirmed the Parcel 2 Order and Second Parcel 2 Order
ZC Order 13-14C. ZC approved 2-Year Time Extension Parcel 2	March 2, 2023 (based on the recommendation that the extension period begins on the date of the Courts affirmation of the Parcel 2 Second Stage PUD Order).	--	--

In addition to the above appeals which directly affected the Applicant's ability to implement the Zoning Commission Order on Parcel 2, there have also been appeals to demolition permits to prepare the site for construction. The table below summarizes the appeals.

Date	Actions/Appeals
August 6, 2019	Demolition Permit granted for some existing improvements on the McMillan PUD site
Late 2019	Demolition Permit appealed to D.C. Office of Administrative Hearings ("OAH") and the D.C. Superior Court ("DCSC").
February 19, 2020	Injunction against any demolition or construction activity on the McMillan PUD site until the appeals of the Demolition Permit that were pending before OAH and DCSC, are resolved
March 18, 2021, and March 22, 2021	OAH and DCSC decisions appealed to the Court
May 28, 2021	Court issued a stay of Demolition Permit.
August 10, 2021	D.C. Council approves the McMillan Site Development Act of 2021 mandating that all processes proceed without further delay through all phases of demolition and construction.
October 28, 2021	D.C. Court of Appeals affirms the OAH and DCSC decisions based on the McMillan Site Development Act of 2021

Waiver for Time Extension

Subtitle Z, § 705.5, states:

An applicant with an approved PUD may request no more than two (2) extensions. The second request for an extension may be approved for no more than one (1) year.

The Applicant has requested a waiver to allow a second extension for a period of three-years. A waiver from this requirement is allowed by Subtitle Z § 101.9, which states:

The Commission may, for good cause shown, waive any of the provisions of this subtitle if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

As discussed earlier, the scheduled development of the overall McMillan PUD site has been affected by several factors, the main ones being litigation. Now that demolition and construction can proceed, there is a significant amount of site preparation and infrastructure work that has to be done in order for the Parcel 2 development to proceed. The Applicant anticipates that the requested extension will allow them enough time to finalize building plans, process permits and begin construction in a timely manner.

Approval of the requested waiver would allow for the provision of 236 units and 18,772 gross square feet of ground floor retail uses which would benefit the community and the City as a whole. OP therefore recommends approval of the requested second time extension and for the waiver to allow the Applicant three years in which to file for a building permit for Parcel 2.